

**A Small Medium Enterprise Development Bank Malaysia Bhd v
Armada TPCE Sdn Bhd & Ors**

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-58-01 OF
2020
ATAN MUSTAFFA JC
30 MARCH 2021

C *Civil Procedure — Summary judgment — Application for summary judgment
— Whether the deponent of the affidavit had personal knowledge — Whether
certificate of indebtedness was conclusive evidence of the debt due — Whether there
was triable issue — Whether there was valid cause of action — Whether the
facilities agreement was valid — Whether the guarantee could be enforced*
D — *Rules of Courts 2012 O 14*

This was the plaintiff's summary judgment application ('encl 149') against the first defendant and the fourth defendant ('the defendants') arising from a writ action filed by the plaintiff against the defendants in this suit for recovery under

E Commodity *Murabah* Revolving Financing-i facilities granted by the plaintiff to the first defendant and related guarantors. The plaintiff granted the first defendant and the first defendant accepted a Commodity *Murabah* Revolving Financing-i (CMRF-I) facility of RM10m, a Commodity

F *Murabah* Revolving Financing-i (CMRF-I) facility of RM3m and Commodity *Murabah* Revolving Financing-i (CMRF-I) facility of RM15m ('the facilities'). As part of the security arrangement under the facilities, the second defendant to eight defendant executed a guarantee and indemnity dated 30 May 2017 ('the guarantee') whereby in consideration of the plaintiff, inter alia, granting or continuing to make available the facilities to the first

G defendant, jointly and severally guaranteed and agreed unconditionally and irrevocably to pay on demand all and any sums due and owing by the first defendant to the plaintiff on the financing facilities advanced by the plaintiff including all commission, costs, charges and expenses including legal costs on a solicitor client basis. Additionally, the first facility was secured by assignments

H and charges on the first defendant's project accounts and contract proceeds. The plaintiff alleged that the first defendant defaulted the facilities by failing to pay the plaintiff the amounts due for payment on the relevant due dates. No payment was made by all the defendants in this action and the plaintiff therefore filed this action, claiming for the sums due. The issues arose in this

I application were: (a) whether the deponent of the affidavit in support of the summary judgement application had personal knowledge of its contents; (b) whether the certificate of indebtedness was conclusive evidence of the debt due to the plaintiff; (c) whether there were any triable issues which necessitated the matter to be set for trial; (d) whether the plaintiff had a valid cause of action;

(e) whether the facilities agreement was valid; and (f) whether the guarantee was enforceable against the guarantors.

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Held, allowing the application:

- (1) The position in law with regards belief relating to assertions in a plaintiff's affidavits in an O 14 of the Rules of Court 2012 application was for the deponent to state his belief that there was no defence to the claim and there was no requirement to say any more than that. In any event, the plaintiff's deponent was the Head, Special Assets of the plaintiff which was the division managing the facilities availed to the first defendant since April 2019 and he had access to accounts and relevant records on the facilities thus possessing sufficient knowledge to depose matters stated in the plaintiff's affidavits. From the affidavit evidence, the first defendant was, at all times, aware that the facilities were managed by the Special Assets Department and could not now raise any challenge to the same when the defendants had previously dealt with the very same Special Assets Department without complaint. Thus, there was no merit to the submission that the deponent's affidavits were hearsay (see paras 17–20).
- (2) The defendants merely challenged the calculation of the debt claimed and challenged the plaintiff to produce documentary proof of the defendants' indebtedness without proving any manifest error on the plaintiff's certificate of indebtedness. The plaintiff's certificate of indebtedness was a conclusive proof of evidence of indebtedness unless the defendants could show a manifest error on the face of the certificate of indebtedness. The defendants had failed to discharge their burden to establish manifest error on the calculations of the outstanding sum set out in the certificate of indebtedness. The certificate of indebtedness bound the defendants and was conclusive evidence of the debt due and owing by the defendants to the plaintiff as claimed by the plaintiff. The words 'TO BE ISSUED ON THE BANK'S LETTERHEAD' do not detract from the conclusiveness of the certificate of indebtedness. The contents of exh 'SME10' all confirmed the indebtedness of the defendants without any doubt as to its purpose. As for exh 'SME10' being undated, what mattered was the amounts stated by the plaintiff to be what was outstanding as at 31 December 2019, the same date as at which the same amounts were outstanding as pleaded in the amended statement of claim. As for exh 'SME10' not containing the Interbank Islamic Money Market (IIMM) rate for the calculation of the compensation, it was already exhibited within exh 'SME4'. The conclusive evidence clauses did not require it to be exhibited and the defendants had never challenged the rate in their affidavits (see paras 27 & 29–30).

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- A (3) The court found that contractually, the plaintiff was entitled to consolidate, debit and set off any advance made on behalf of the first defendant against all available balance in the accounts towards the settlement of any banking facility granted by the plaintiff. The first defendant had agreed that any proceeds in the first defendant's project account shall be prioritised towards payment of all moneys which were due and owing to the plaintiff and all other indebtedness of the first defendant owing and payable to the plaintiff before payment of surplus (if any) to the first defendant or any other person. The first defendant's default under the facility agreements came about because there were insufficient funds to meet payment on the financings under the facilities even after the alleged wrongful payments by Petronas SKO into the designated account. The defendants had not shown to the court how the liability of the first defendant under the facilities would be affected should the matter go to trial and the circumstances of the alleged overpayment by Petronas SKO be confirmed (see paras 35–37).
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- E (4) The learned judicial commissioner did not find that the defendants had raised any triable issues. The pleaded cause of action against the defendants which was based on the breach of the terms of the facilities and the guarantee was clearly set out in the cause papers filed by the plaintiff. The cause of action was founded on the failure of the first defendant and its guarantors (including the fourth defendant) in meeting the repayment for total outstanding due and owing under the facilities availed to the first defendant. When the defendants were alerted of the insufficient payments received into the project account, the defendants did not at any time contemporaneous to the facilities and failure to pay arrears instalments suggested irregular administration of the project account. The court agreed with the plaintiff's submission that discrepancies of the purchase orders, debit notes and variation orders were matters between the first defendant and its client and also with regards to the alleged mistaken payment by Petronas SKO was immaterial to the instant proceeding between the plaintiff and the defendants. The earlier favourable review of the financings at the first defendant's request, subject to the terms and conditions of the facilities, did not operate to prohibit the plaintiff from recovering the outstanding sum from the defendants, nor do previous payments made by the first defendant and/or its client into the project account allow continuous default and breach by the defendants (see paras 40–43).
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- I (5) The court was of the view that there was no requirement in law for the first defendant, the recipient of the financings under the facilities, to have been made a party to the purchase of the underlying Commodity under the three facilities, all Commodity *Murabahah*-i Financing. The documents relating to the facilities expressly authorised the plaintiff to purchase the Commodity with the first defendant's undertaking to

purchase the specified Commodity at the plaintiff's sale price. The mode of financing pursuant to the Commodity *Murabahah* concept was duly complied with all the necessary documents were duly executed and could not be challenged by the defendants. The validity of financing under the Commodity *Murabahah* concept had consistently been recognised by the courts. The contention by the defendants that the defendants had no knowledge of the purchase of the underlying Commodity at BSAS and the *Wakalah* agreement and *Murabah* sale contracts were not valid was farcical especially since the first defendant had benefited from the facilities granted by the plaintiff to the first defendant. The defendants could not five years after the execution of the 9 June 2015 facility agreement dispute the sale and purchase of the underlying Commodity and the validity of the facilities (see paras 47–48 & 51–53).

- (6) The plaintiff can pursue an action against the fourth defendant without the plaintiff having to first recover from the first defendant pursuant to the terms and conditions of the facility agreements and the guarantee and as recognised in law. The plaintiff was not precluded from pursuing its remedies against the fourth defendant as guarantor for the first defendant under the facilities as the guarantee did not contain such a condition before a demand could be made on the guarantors. Further, the fourth defendant and the other guarantors as principal debtors, irrevocably and unconditionally guaranteed jointly and severally to the plaintiff the payment of all sums of money owing to the plaintiff from the first defendant as provided under cl 15 of the guarantee. In any event, the defendants had failed to show that the plaintiff failed to conduct its part of the obligations in accordance with the financing agreements executed by the first defendant (see paras 56 & 59–60).

[Bahasa Malaysia summary]

Ini adalah permohonan penghakiman terus plaintif ('lampiran 149') terhadap defendan pertama dan defendan keempat ('defendan-defendan') yang timbul daripada kausa tindakan writ yang difailkan oleh plaintif terhadap defendan-defendan dalam saman ini untuk mendapatkan semula jumlah pinjaman di bawah kemudahan Pembiayaan Komoditi yang diberikan oleh plaintif kepada defendan pertama dan penjamin. Plaintif memberikan defendan pertama dan defendan pertama menerima kemudahan Pembiayaan Komoditi *Murabahah*-i (CMRF-I) sebanyak RM10 juta, kemudahan Pembiayaan Pusingan Komoditi-i (CMRF-I) sebanyak RM3 juta dan kemudahan Komoditi *Murabahah* Pinjaman-i (CMRF-I) sebanyak RM15 juta ('pinjaman-pinjaman tersebut'). Sebagai sebahagian daripada sekuriti dibawah pinjaman-pinjaman tersebut, defendan kedua hingga defendan kelapan melaksanakan jaminan dan indemniti bertarikh 30 Mei 2017 ('jaminan'), antara lain, memberikan atau terus menyediakan pinjaman-pinjaman tersebut defendan pertama, bersama-sama dan secara berasingan dijamin dan

- A dipersetujui tanpa syarat dan tidak boleh ditarik balik untuk membayar atas permintaan semua dan apa-apa jumlah yang perlu dibayar dan disebabkan oleh defendan pertama kepada plaintif ke atas kemudahan pembiayaan yang didahulukan termasuk semua komisen, kos, caj dan perbelanjaan termasuk kos guaman atas dasar peguam cara. Di samping itu, pinjaman tersebut telah
- B dijamin dengan projek defendan pertama. Plaintif mendakwa bahawa defendan-defendan telah gagal membayar jumlah yang perlu dibayar pada tarikh akhir yang dipersetujui. Tiada bayaran dibuat oleh semua defendan dalam tindakan ini dan saman yang difailkan menuntut jumlah yang perlu dibayar. Isu yang timbul dalam permohonan ini adalah: (a) affidavit yang
- C menyokong permohonan penghakiman terus mempunyai pengetahuan peribadi tentang kandungannya; (b) sama ada sijil perakuan keberhutangan adalah bukti muktamad hutang; (c) jika terdapat sebarang isu yang boleh dibicarakan yang memerlukan perkara itu ditetapkan untuk perbicaraan; (d) sama ada plaintif mempunyai kausa tindakan yang sah; (e) sama ada perjanjian kemudahan pinjaman-pinjaman tersebut adalah sah; dan (f) sama ada jaminan itu boleh dikuatkuasakan terhadap penjamin.
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Diputuskan, membenarkan permohonan tersebut:

- E (1) Kedudukan dalam undang-undang berkenaan dengan kepercayaan peribadi di dalam affidavit plaintif dalam A 14 Kaedah-Kaedah Mahkamah 2012 untuk deponen menyatakan kepercayaannya bahawa tidak ada pembelaan terhadap tuntutan itu dan tidak ada keperluan untuk menyatakan perkara selain dari itu. Bagaimanapun, deponen
- F untuk plaintif adalah Pengurus Aset Khas yang menguruskan hak-hal defendan pertama sejak April 2019 dan beliau juga menguruskan akaun dan rekod berkaitan mengenai pinjaman-pinjaman tersebut dan jelas mempunyai pengetahuan yang mencukupi untuk mengikrarkan perkara yang dinyatakan dalam affidavit plaintif. Daripada keterangan di dalam affidavit tersebut, defendan pertama pada setiap masa material,
- G mempunyai pengetahuan bahawa kemudahan pinjaman-pinjaman tersebut diuruskan oleh Jabatan Aset Khas dan tidak menimbulkan sebarang aduan kepada perkara tersebut sebelum ini ketika berurusan. Oleh itu, tidak ada merit kepada hujah bahawa affidavit deponen itu sah (lihat perenggan 17–20).
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- I (2) Defendan-defendan hanya mencabar pengiraan hutang yang dituntut dan mencabar bukti dokumentari keberhutangan defendan-defendan tanpa membuktikan kesilapan nyata kepada perkiraan keberhutangan tersebut. Sijil keberhutangan adalah bukti konklusif keberhutangan melainkan jika defendan-defendan dapat menunjukkan kesilapan nyata pada pengiraannya. Defendan-defendan telah gagal untuk melepaskan beban pembuktian untuk mewujudkan kesilapan nyata pada pengiraan jumlah tertunggak yang dinyatakan di dalam sijil keberhutangan. Sijil keberhutangan mengikat defendan-defendan. Perkataan ‘TO BE ISSUE

ON THE BANK HEAD' tidak menghalang hak konklusif sijil keberhutangan. Kandungan eksh 'SME10' semua mengesahkan keberhutangan defendan-defendan tanpa sebarang keraguan mengenai tujuannya. Bagi eksh 'SME10', perkara yang penting adalah jumlah yang dinyatakan oleh plaintif yang belum dijelaskan setakat 31 Disember 2019, iaitu jumlah yang tertunggak seperti yang dituntut dalam pernyataan tuntutan yang dipinda. Bagi eksh 'SME10' yang tidak mengandungi kadar Pasaran Wang Islam Antara Bank (IIMM) untuk pengiraan pampasan, ia juga ditunjukkan di dalam eksh 'SME4'. Klausula bukti konklusif tidak diperlukan dan defendan tidak pernah mencabar kadar jumlahnya dalam afidavit mereka (lihat perenggan 27 & 29–30).

- (3) Mahkamah mendapati bahawa secara kontrak, plaintif berhak untuk menyatukan, mendebit dan menolak sebarang pendahuluan yang dibuat bagi pihak defendan pertama terhadap semua baki yang ada dalam akaun ke arah penyelesaian perbankan yang diberikan oleh plaintif. Defendan pertama telah bersetuju bahawa hasil projek defendan pertama hendaklah dibayar kepada plaintif. Masalah timbul kerana defendan-defendan tidak mempunyai wang yang mencukupi untuk memenuhi bayaran bagi pinjaman-pinjaman tersebut selepas dakwaan salah laku oleh Petronas SKO ke dalam akaun yang ditetapkan. Defendan-defendan tidak menerangkan bagaimana liabiliti defendan pertama di bawah kemudahan pinjaman-pinjaman tersebut akan terjejas sekiranya perkara ini ke perbicaraan penuh dan perkara fakta terlebih bayar oleh Petronas SKO ditentukan (lihat perenggan 35–37).
- (4) Pesuruhjaya kehakiman tidak meneliti bahawa defendan telah menimbulkan apa-apa isu yang boleh dibicarakan. Alasan yang dikenakan adalah untuk tindakan terhadap defendan-defendan yang berdasarkan pelanggaran syarat-syarat jaminan dan indemniti jelas dinyatakan dalam pliding yang difailkan oleh plaintif. Kausa tindakan juga difailkan ke atas kegagalan defendan-defendan dan penjamin-penjaminnya dalam memenuhi obligasi bayaran balik jumlah tunggakan yang perlu dibayar. Apabila defendan-defendan dimaklumkan tentang bayaran yang tidak mencukupi yang diterima ke dalam akaun bank tersebut, defendan-defendan tidak masih gagal membayar ansuran tunggakan. Mahkamah bersetuju dengan hujah bahawa percanggahan arahan pembelian, nota debit dan arahan kepelbagaian adalah antara defendan pertama dan anak guamnya dan juga berkenaan dengan hujah salah pembayaran oleh Petronas SKO adalah tidak berkaitan dengan prosiding ini. Pinjaman-pinjaman tersebut adalah terikat kepada terma dan syarat dan tidak menghalang plaintif daripada mendapatkan semula jumlah tertunggak daripada defendan-defendan, dan defendan-defendan juga melakukan pelanggaran kontrak (lihat perenggan 40–43).

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- A (5) Mahkamah berpendapat tiada ada keperluan di dalam undang-undang untuk defendan pertama, penerima pembiayaan di bawah kemudahan pinjaman-pinjaman tersebut, telah dijadikan pihak untuk membeli komoditi asas di bawah tiga pinjaman tersebut. Dokumen-dokumen yang berkaitan dengan kemudahan itu dengan jelas memberi kuasa kepada plaintif untuk membeli komoditi itu dengan harga jualan plaintif. Cara pembiayaan yang dinyatakan selaras dengan konsep *Murabahah* Komoditi dan telah dipatuhi dengan sewajarnya berdasarkan semua dokumen yang diperlukan dan tidak boleh dicabar oleh golongan tersebut. Keesahan pembiayaan di bawah konsep *Murabahah* Komoditi telah diiktiraf secara konsisten oleh mahkamah. Dakwaan defendan-defendan bahawa mereka tidak mengetahui tentang pembelian komoditi asas di perjanjian Wakalah dan kontrak jualan *Murabah* adalah tidak masuk akal kerana defendan pertama telah mendapat manfaat daripada pinjaman-pinjaman yang diberikan oleh plaintif. Selepas pelaksanaan perjanjian kemudahan 9 Jun 2015 selama lima tahun, defendan tidak boleh mempertikaikan penjualan dan pembelian komoditi tersebut dan keesahan kemudahan itu (lihat perenggan 47–48 & 51–53).
- E (6) Plaintif boleh mengambil tindakan terhadap defendan keempat tanpa perlu mendaatkan jumlah hutang daripada defendan pertama menurut terma di dalam kontrak tersebut. Plaintif tidak dikecualikan dari menggunakan remedies terhadap defendan keempat sebagai penjamin kepada defendan pertama dibawah kemudahan pinjaman-pinjaman tersebut. Seterusnya, defendan keempat dan penjamin-penjamin lain sebagai penghutang utama, telah menjamin secara bersesama dan sebahagiannya bertanggung di bawah klausa 15 perjanjian jaminan tersebut. Di dalam kes ini, defendan-defendan gagal untuk menunjukkan tindakan plaintif gagal di dalam melaksanakan tanggungjawab di dalam kemudahan pinjaman-pinjaman tersebut yang dilaksanakan oleh defendan pertama (lihat perenggan 56 & 59–60).]
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Cases referred to

- H *Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors* [2017] 2 MLJ 686, CA (refd)
- Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (folld)
- CIMB Bank Bhd v Mohd Shah bin Hashim* [2011] MLJU 547; [2011] 1 LNS 561, HC (folld)
- I *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, FC (refd)
- Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; [1998] 3 CLJ 605, CA (refd)
- EON Bank Bhd (previously known as Oriental Bank Bhd) v Mohd Yunus bin Alias*

- Ors* [2010] 9 MLJ 587; [2010] 1 LNS 419, HC (refd) A
Fulcrum Capital Sdn Bhd v Low Kon Yang [2003] 4 MLJ 509, HC (refd)
Kuwait Finance House (Malaysia) Berhad v Vesta Energy Sdn Bhd & Ors [2012] MLJU 1762; [2012] 9 CLJ 516, HC (refd)
Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin [2014] 7 MLJ 685, HC (refd) B
Miles v Bull [1968] 3 All ER 632, QBD (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (folld)
RHB Islamic Bank Berhad v Veheng Global Trade Sdn Bhd & Ors [2011] 1 LNS 684, HC (refd) C
Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit [2011] 3 MLJ 766; [2010] 4 CLJ 388, HC (refd)
United Trade Arena (M) Sdn Bhd & Ors v Bank Pertanian Malaysia Bhd [2016] 2 MLJ 65, CA (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd) D

Legislation referred to

Rules of Court 2012 O 14, O 14 rr 2, 3, 3(1)

- Jeyanthini Kannaperan (Chan Jia Lin with her) (Shearn Delamore & Co) for the plaintiff* E
Ebenezer Ramesh (Yahna SG) for the first and fourth defendants.

Atan Mustaffa JC:

[1] This judgment concerns the plaintiff's summary judgment application (encl 149) against the first defendant and the fourth defendant arising from a writ action filed by the plaintiff against the defendants in this suit for recovery under Commodity *Murabah* Revolving Financing-i facilities granted by the plaintiff to the first defendant and related guarantors. F
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[2] At the hearing of this application I granted summary judgment for the plaintiff. This judgment contains the full grounds for my decision. I refer to the first defendant and the fourth defendant, the relevant defendants in this application as 'the defendants'. H

BACKGROUND FACTS

[3] At the request of the first defendant, the plaintiff granted the first defendant and the first defendant accepted a Commodity *Murabah* Revolving Financing-i (CMRF-I) facility of RM10m ('the first facility'), a Commodity *Murabah* Revolving Financing-i (CMRF-I) facility of RM3m ('the second facility') and Commodity *Murabah* Revolving Financing-i (CMRF-I) facility of RM15m ('the third facility'). All three facilities are I

- A** referred to together as ‘the facilities’. The stated purpose of the facilities in the relevant letter of offer was to ‘To finance working capital requirement for preliminary work inclusive of manpower mobilization cost, renovation works, purchase/lease of computers, office equipment upgrading system and software in relation to the- contract of ‘Provision Of Facilities Improvement. Proposal
- B** (FJP). Engineering And Project interface Support Services For Petronas Carigali Sarawak Operations (SKO) And Peninsular Malaysia Operations (FMO)’ Contract No CBO/2013/SKO-B1E/OOG5 received from Petronas Carigali Sdn Bhd.
- C** [4] The facilities were documented by the following documents:
- (a) letter of offer dated 24 April 2015;
 - (b) asset sale agreement dated 2 June 2015;
 - (c) letter of changes 8 June 2015;
 - (d) facility agreement dated 9 June 2015;
 - (e) letter of changes dated 29 November 2016;
 - (f) letter of offer dated 9 May 2017;
 - (g) *Wakalah* agreement dated 30 May 2017;
 - (h) *Murabahah* sale contracts executed on 30 May 2017;
 - (i) facility agreements dated 30 May 2017;
 - (j) letter of offer dated 1 June 2017; and
 - (k) letter of offer 20 June 2017.
- G** [5] As part of the security arrangement under the facilities, the second defendant to eighth defendant executed a guarantee and indemnity dated 30 May 2017 (‘the guarantee’) whereby in consideration of the plaintiff, inter alia, granting or continuing to make available the facilities to the first defendant, jointly and severally guaranteed and agreed unconditionally and irrevocably to pay on demand all and any sums due and owing by the first defendant to the plaintiff on the financing facilities advanced by the plaintiff including all commission, costs, charges and expenses including legal costs on a solicitor client basis.
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- I** [6] Additionally the first facility was secured by assignments and charges on the first defendant’s project accounts and contract proceeds documented by the following:
- (a) specific deed of assignment of contract proceeds dated 9 June 2015;
 - (b) charge over project account both dated 9 June 2015;

- (c) charge over project account dated 30 May 2017; A
- (d) general deed of assignment of contract proceeds dated 30 May 2017; and
- (e) general deed of assignment of contract proceeds dated 30 July 2017. B

[7] The first defendant, according to the plaintiff, defaulted by failing to pay the plaintiff the amounts due for payment on the relevant due dates and the plaintiff issued a letter dated 1 July 2019 to the first defendant through the plaintiff's solicitor demanding for the sum owing. Despite the said demand, the first defendant did not pay the amount owing to the plaintiff, constituting an event of default under the facilities. The plaintiff then issued a letter dated 20 August 2019 through its solicitor to the first defendant to give notice that the entire balance payable on the facilities together with compensation (*ta'widh*), costs and charges was immediately due and owing and sought that the first defendant within 14 days from the said letter make payment of RM10,077,259.47 as at 14 August 2019. By the said letter the plaintiff also gave notice that the facilities stood terminated and recalled. C D

[8] The plaintiff then issued a letter dated 20 August 2019 through its solicitors to the third to eighth defendants who stood as guarantors under the guarantee demanding payment of all amounts outstanding due and owing under the facilities. E

[9] No payment was forthcoming from all the defendants in this action and the plaintiff filed this action, claiming, together with with compensation for late payment (*ta'widh*), the following sums as prayed in the re-amended statement of claim: F

- (a) a sum of RM4,216,525.77 due and owing as at 31 December 2019 for the first facility; G
- (b) a sum of 3,245,727.42 due and owing as at 31 December 2019 for the second facility; and
- (c) a sum of RM466,847.30 due and owing as at 31 December 2019 for the third facility H

together with late payment charges (*ta'widh*).

[10] On 16 October 2020, the plaintiff filed this application (encl 149) to record judgment for the sum prayed for under the reamended statement of claim above together with late payment charges (*ta'widh*). I

A LAW ON SUMMARY JUDGMENT (O 14)

B [11] It is trite that once an application under O 14 of the Rules of Court 2012 ('the ROC') is shown to have been correctly and properly filed, the burden shifts and thus rests on the defendant who desires to resist the application to raise a defence which shows a 'bona fide triable issue', in the sense of an issue which justifies and warrants the matter to be considered at the trial proper.

C [12] Order 14 r 3 of the ROC provides that unless the defendant satisfies the court with respect to the claim, or the part of a claim, to which the application relates that:

- D (a) there is an issue or question in dispute which ought to be tried; or
(b) there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relied claimed.

E [13] It is useful to refer once again to the often quoted decision of the former Supreme Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 which ruled as follows:

F We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are: (1) whether the case comes within the Order; and (2) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:

- G (i) the defendant must have entered an appearance;
(ii) defendant; and
(iii) the affidavit in support of the application must comply with the requirements of r 2 of the Order 14.

H ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him.

I [14] The plaintiff has satisfied these preliminary requirements, and this is not disputed by the defendants. Thus the burden is now firmly on the defendants to show that there is a triable issue that does not justify summary judgment to be entered against them. If the defendants can demonstrate even one triable issue, this court will not grant summary judgment. But it has to be a genuinely triable issue as would require a trial in order to determine it (see *Voo*

Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241).

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ISSUES

[15] The defendants raised a preliminary issue, submitting that the plaintiff's affidavits is hearsay evidence as the deponent of the affidavits was not involved in the transactions relating to the first defendant.

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[16] The defendants further submitted that there were triable issues as follows:

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- (a) the sum of debt claimed by the plaintiff is unproven;
- (b) the contents of the plaintiff's affidavit in support do not clearly set out the cause of action against the first defendant or against all the defendants as a whole;
- (c) there was a wrongful deposit of the sum of RM6,923,167 made by the first defendant's customer, Petronas SKO, into the first defendant's designate account which is a triable issue or is a reason for there be a trial of the plaintiff's claim;
- (d) the terms relating to the trading of commodities in respect of the facilities were not followed by the plaintiff; and
- (e) the guarantee is unenforceable as the plaintiff failed to conduct its part of the obligations in accordance the financing agreements executed by the first defendant and the plaintiff has not proved its claim against the first defendant.

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ANALYSIS AND FINDINGS

Deponent's personal knowledge

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[17] It is submitted by the plaintiff that the contents of the plaintiff's affidavits is hearsay evidence as Lee Kuan Vun, the deponent of the affidavits, was not involved in the transactions relating to the first defendant and does not have personal knowledge of matters that have transpired in relation to the first defendant or any other defendants named in this suit. Further to this, the defendants submitted:

H

- (a) the deponent has failed to provide any specific sources or grounds for the statement of information or belief relating to his assertions as required under O 14 r 2 of the ROC; and

I

A (b) the plaintiff has not produced the documents to support the facts asserted in the affidavits although the defendants in their affidavits have questioned the validity and veracity of most of the facts deposed by Lee Kuan Vun.

B [18] I do not find any merit in this submission.

C [19] The position in law with regards belief relating to assertions in a plaintiff's affidavits in an O 14 application is for the deponent to state his belief that there is no defence to the claim and there is no requirement to say any more than that as decided in *Fulcrum Capital Sdn Bhd v Low Kon Yang* [2003] 4 MLJ 509 (HC), Abdul Aziz JCA stated the following:

D In my opinion, since O 14 r 2(1) requires the affidavit to state only that in the deponent's belief there is no defence to the claim, there is no justification for asking the deponent to say more than that. The deponent must be presumed to have the statement of defence in mind when he affirmed that in his belief there was no defence to the claim. He must be taken to be so affirming notwithstanding the statement of defence. As to explaining why he believes there is no defence notwithstanding the statement of defence, I do not think that the plaintiffs ought to bear the onus of showing that there is no defence. The onus is on the defendant to show by affidavit that there is a triable defence.

F [20] In any event, the plaintiff's deponent was the Head, Special Assets of the plaintiff which is the division managing the facilities availed to the first defendant since April 2019 and he has access to accounts and relevant records on the facilities thus possessing sufficient knowledge to depose matters stated in the plaintiff's affidavits. From the affidavit evidence, the first defendant was, at all times, aware that the facilities were managed by the Special Assets Department and cannot now raise any challenge to the same when the defendants have previously dealt with the very same Special Assets Department without complaint.

H [21] I am also guided by *CIMB Bank Bhd v Mohd Shah bin Hashim* [2011] MLJU 547; [2011] 1 LNS 561 where it was held that it is illogical for someone from a bank to affirm an affidavit without authority or has no knowledge of the facts deposed in the affidavit.

Challenge to the certificate of indebtedness

I [22] It is submitted by the defendants that despite the certificate of indebtedness produced by the plaintiff in exh 'SME10', the sum of debt claimed by the plaintiff is unproven and this suit should be set down for trial. The defendants' submissions and contention in relation to this position is as follows:

- (a) in the defendants' affidavits, they questioned and challenged the facts asserted by the plaintiff in regard to the calculation of the debt claimed and challenged the plaintiff to produce documentary proof in the form of statements of accounts as averred in para 14 of encl 47 paras 10 and 13.4 of encl 75 and para 13.5 of encl 88; A
- (b) apart from the certificate of indebtedness to establish the defendants' debt, the plaintiff has failed to produce any accounts documents to prove the debt claimed by the plaintiff when challenged; B
- (c) the certificate of indebtedness is not valid as: C
 - (i) exh 'SME10' was exhibited to amend the certificate to state that the loan facility was 'Pembiayaan-i Komoditi Berputar *Murabahah* (CMRF-i)-I RM15m and not 'Pembiayaan-i Terma Bai'lnah RM440,000' only after objections were raised by the defendants in their affidavits to oppose encl 23, the earlier notice of application filed by the plaintiff which was later amended and filed as encl 149; D
 - (ii) exh 'SME10' was not prepared with earnestness or with conscientiousness for it to be accepted as accurate or true as the certificate of indebtedness carries the heading 'TO BE ISSUED ON BANK'S LETTERHEAD' indicating that most likely it was prepared by a third party and that Lee Kuan Yoon did not give thought to the contents of said exh 'SME10'; E
 - (iii) exh 'SME10' does not contain the Interbank Islamic Money Market (IIMM) rate for the calculation of the compensation; and F
 - (iv) exh 'SME10' is undated.

[23] To appreciate the submissions of the defendants, the certificate of indebtedness exhibited in encl 24 as exh 'SME4' is reproduced below: G

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We hereby certify that the following represents the amounts due and owing on the banking facilities availed to ARMADA TPCE SDN BHD [No. Syarikat: 826078-U] and guaranteed by ARMADA HOLDINGS SDN BHD [No. Syarikat: 1168024-T], SUHAIRI BIN ABDUL GHANI [No. K/P: 671031-07-5001], WASI KHAN @ WASIYU ZAMA BIN ISRAR AHMAD [No. K/P: 691216-71-5001], MOHAMED ZA'ABA BIN ABBAS [No. K/P: 640321-08-6067], AZRUL RIZAL BIN RUSLI [No. K/P: 770413-14-5891], ROSLI BIN ABU BAKAR [No. K/P: 680610-03-6185] and KHAIRIL ANUAR BIN MUSTAFA [No. K/P: 700915-08-5039]

PARTICULARS

• THE COMMODITY MURABAHAH REVOLVING FINANCING - I (CMRE-I) - I

E

of RM10,000,000.00

Total Amount Outstanding as at 31.12.2019

RM4,216,525.77

F

Compensation (ta'widh) for late payment continuing from 1.1.2020 on the outstanding balance (being the balance purchase price and accrued earned profit) at 1% per annum until the date of Judgment and/or expiry of the Financing on 30 Jun 2022 whichever is earlier and thereafter at the Interbank Islamic Money Market (IIMM) Rate or any other method of calculation approved by the Shariah Advisory Council of Bank Negara Malaysia until the date of full and final settlement.

G

• THE COMMODITY MURABAHAH REVOLVING FINANCING - I (CMRE-I) - II

of RM3,000,000.00

Total Amount Outstanding as at 31.12.2019

RM3,245,727.42

H

Compensation (ta'widh) for late payment continuing from 1.1.2020 on the outstanding balance (being the balance purchase price and accrued earned profit) at 1% per annum until the date of Judgment and/or expiry of the Financing on 30 June 2020 whichever is earlier and thereafter at the Interbank Islamic Money Market (IIMM) Rate or any other method of calculation approved by the Shariah Advisory Council of Bank Negara Malaysia until the date of full and final settlement.

I

2

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• THE BAI' INAH TERM FINANCING-I of RM440,000.00

Total Amount Outstanding as at 31.12.2019

RM466,847.30

B

Compensation (ta'widh) for late payment continuing from 1.1.2020 at the Interbank Islamic Money Market (IIMM) Rate (the Financing expired on 1.7.2019) or any other method of calculation approved by the Shariah Advisory Council of Bank Negara Malaysia until the date of full and final settlement.

C

06 MAR 2020

Certified by:-

D



LEE KUAN VUN
Head, Special Asset Department

E

[24] The certificate of indebtedness exhibited in encl 69 as exh 'SME10' is reproduced below:

F

G

H

I

A



Small Medium Enterprise Development
Bank Malaysia Berhad 4992-01
Menara SME Bank, Jalan Sultan Ismail,
PO Box 12352, 50734 Kuala Lumpur,
Malaysia.
Tel : +603 2615 2020, +603 2615 2828
Fax: +603 2692 8520, +603 2698 1748
www.smebank.com.my

B

TO BE ISSUED ON BANK'S LETTERHEAD**CERTIFICATE OF INDEBTEDNESS**

C

We hereby certify that the following represents the amounts due and owing on the banking facilities availed to ARMADA TPCE SDN BHD [No. Syarikat: 826078-U] and guaranteed by ARMADA HOLDINGS SDN BHD [No. Syarikat: 1168024-T], SUHAIRI BIN ABDUL GHANI [No. K/P: 671031-07-5001], WASI KHAN @ WASIYU ZAMA BIN ISRAR AHMAD [No. K/P: 691216-71-5001], MOHAMED ZA'ABA BIN ABBAS [No. K/P: 640321-08-6067], AZRUL RIZAL BIN RUSLI [No. K/P: 770413-14-5891], ROSLI BIN ABU BAKAR [No. K/P: 680610-03-6185] and KHAIRIL ANUAR BIN MUSTAFA [No. K/P: 700915-08-5039]

D

PARTICULARS

E

- **THE COMMODITY MURABAHAH REVOLVING FINANCING - I (CMRF-I) - I**

of RM10,000,000.00

Total Amount Outstanding as at 31.12.2019

RM4,216,535.77

F

Compensation (ta'widh) for late payment continuing from 1.1.2020 on the outstanding balance (being the balance purchase price and accrued earned profit) at 1% per annum until the date of Judgment and/or expiry of the Financing on 30 Jun 2022 whichever is earlier and thereafter at the Interbank Islamic Money Market (IIMM) Rate or any other method of calculation approved by the Shariah Advisory Council of Bank Negara Malaysia until the date of full and final settlement.

G

- **THE COMMODITY MURABAHAH REVOLVING FINANCING - I (CMRF-I) - II**

of RM3,000,000.00

Total Amount Outstanding as at 31.12.2019

RM3,245,727.42

H

Compensation (ta'widh) for late payment continuing from 1.1.2020 on the outstanding balance (being the balance purchase price and accrued earned profit) at 1% per annum until the date of Judgment and/or expiry of the Financing on 30 June 2020 whichever is earlier and thereafter at the Interbank Islamic Money Market (IIMM) Rate or any other method of calculation approved by the Shariah Advisory Council of Bank Negara Malaysia until the date of full and final settlement.

I

2

• THE COMMODITY MURABAHAH REVOLVING FINANCING – I (CMRF-I)

of RM15,000,000.00

Total Amount Outstanding as at 31.12.2019

RM466,847.30

Compensation (ta'widh) for late payment continuing from 1.1.2020 at the Interbank Islamic Money Market (IIMM) Rate (the Financing expired on 1.7.2019) or any other method of calculation approved by the Shariah Advisory Council of Bank Negara Malaysia until the date of full and final settlement.

Certified by:-



LEE KUAN YUN

Head, Remedial & Recovery II

[25] In encl 149, the amended notice of application, prayer A(v) shows the amendment to the earlier prayer A(v) in encl 23:

- v. Jumlah Tunggakan sebanyak **RM466,847.30** yang terhutang dan kena dibayar pada 31.12.2019 di atas ~~Pembiayaan-i Terma Bai'Inah sebanyak RM440,000.00~~ Pembiayaan-i Pusingan Komoditi Murabahah (CMRF-I) sebanyak RM15.000.000.00.

[26] I do not accept the defendants' submissions on this point.

[27] The defendants merely challenged the calculation of the debt claimed and challenged the plaintiff to produce documentary proof of the defendants' indebtedness without proving any manifest error on the plaintiff's certificate of indebtedness. Pursuant to Section W Schedule 2 Standard Terms and Conditions to the letter of offer dated 9 May 2017, sections 16.2(a) and 16.2(b) of the Facility Agreement dated 9 June 2015, sections 16.2(a) and 16.2(b) of the Facility Agreement dated 3 May 2017 and cll 12 and 17 of the guarantee, the defendants have agreed that a certificate or statement of account of the plaintiff showing the indebtedness of the defendants certified or signed by the plaintiff's authorised officer shall be binding and conclusive against the

A defendants. The plaintiff's certificate of indebtedness operates as a conclusive proof of evidence of indebtedness unless the defendants can show a manifest error on the face of the certificate of indebtedness: *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685. Here, the defendants have failed to discharge their burden to establish manifest error on the calculations of the outstanding sum set out in the certificate of indebtedness. The certificate of indebtedness binds the defendants and is conclusive evidence of the debt due and owing by the defendants to the plaintiff as claimed by the plaintiff.

C [28] I am satisfied that the certificate of indebtedness in exh 'SME10' of encl 69, relied on by the plaintiff was an amendment to correct the typographical error in exh 'SME4' of encl 24 to properly set out the amount due on the third facility of RM15m. Exhibit 'SME10' is identical to the certificate of indebtedness in exh 'SME4' save that the RM466,847.30 due as at 31 December 2019 is confirmed as due on the third facility of RM15m instead of the Bai Inah Term-i Financing stated earlier in error.

E [29] The words 'TO BE ISSUED ON BANK'S LETTERHEAD' do not detract from the conclusivity of the certificate of indebtedness. The deponent of encl 69 has confirmed that exh 'SME10' is issued to correct a typographical error in exh 'SME4' and is intended to serve as a certificate of indebtedness. The contents of exh 'SME10' all confirm the indebtedness of the defendants without any doubt as to its purpose. As for exh 'SME10' being undated, what matters is the amounts stated by the plaintiff to be what was outstanding as at 31 December 2019, the same date as at which the same amounts are outstanding as pleaded in the amended statement of claim.

G [30] As for exh 'SME10' not containing the Interbank Islamic Money Market (IIMM) Rate for the calculation of the compensation, this was already exhibited within exh 'SME4'. I agree with the plaintiff that there is no need for this to be exhibited again. Further the conclusive evidence clauses do not require this to be exhibited and the defendants have never challenged the Bank Negara Malaysia Money Market Rate in their affidavits.

Wrong payments by Petronas SKO

I [31] Relying on *Miles v Bull* [1968] 3 All ER 632 and O 14 r 3(1) of the ROC, it is submitted by the defendants that there was a wrongful deposit of the sum of RM6,923,167 made into the first defendant's designate account which is a triable issue or is a reason for there be a trial of the plaintiff's claim which necessitates this matter to be set down for trial. The defendants' further submissions and contentions relating to this are as follows:

- (a) the first defendant's client Petronas SKO informed the first defendant that a total sum of RM6,923,167 was wrongly deposited into the first defendant's designate account with the plaintiff;
- (b) neither the first defendant nor the plaintiff has any proprietary rights over this sum of RM6,923,167; and
- (c) the first defendant through its letter dated 3 March 2020 informed the plaintiff regarding the payment that was wrongfully made to the first defendant's designate account which was brushed aside by the plaintiff and the sum of RM6,923,167 is still retained by the plaintiff.

[32] The letter dated 3 March 2020 is reproduced below:

(the remainder of this page is left intentionally blank)

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B

Date: 3rd March 2020WITHOUT PREJUDICE
PRIVATE & CONFIDENTIAL

C

Small Medium Enterprise Development Bank Malaysia Berhad,
Menara SME Bank, Jalan Sultan Ismail,
P.O. Box 12352, 50774 Kuala Lumpur.Attention to Tengku Azeman TENGKU Jaafar
Assistant Vice President / Head,
Special Asset 1, Special Asset Department,

D

Re: Letter of Demand Dated 20th August, 2019

We refer to the above matter.

E

We had recently concluded numerous high level management meetings with Petronas SKO, Min.

Pursuant to the meetings and after perusal the various documents, we had been notified that the pertinent PO3620361858 dated 15/12/2017, PO3620352378 dated 25/10/2017, PO3620338560 dated 03/08/2017, PO3620353157 dated 30/10/2017, PO3620350212 dated 11/10/2017, PO3620350205 dated 11/10/2017, PO3620352835 dated 27/10/2017 for the sum of RM6,923,167.00, though the works had not been carried out but payment had been paid by SKO to our designated account in SME by an oversight by all parties.

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However, to this regards we had also verified and confirmed that the findings of SKO to be valid and thereby request you to immediately refund the said sum pursuant to the above Purchase Order to SKO on an urgent basis.

Kindly do the needful on an urgent basis."

G

Yours faithfully,

H

Mohamed Za'aba Bin Abbas
COO

cc: Dato' Wasi Khan Bin Israr Ahmad

I

ARMADA TPCE, SUKRAH, 50000 KUALA LUMPUR
Suite 16-01, 16th Floor, Menara TSB Bank
707, Jalan Tun Razak, 50400 Kuala Lumpur
MALAYSIA Tel: 60216113145 Fax: 6121013865

S/N jAZL4u/E7E29eujOzKR3oQ

**Note : Serial number will be used to verify the originality of this document via eFILING portal

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[33] I find that there is no merit to this submission.

B

[34] If there were merits to the assertions by the first defendant in the letter dated 3 March 2020, Petronas SKO would have made a claim for refund, which was not shown by the defendants.

C

[35] Contractually, the plaintiff is entitled to consolidate, debit and set off any advance made on behalf of the customer (the first defendant) against all available balance in the customer's accounts including current account, investment account or other accounts towards the settlement of any banking facility granted by the plaintiff pursuant to:

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(a) section GG Schedule 2 Standard Terms and Conditions to the letter of offer dated 9 May 2017 (superceding the previous Schedule 2 to the letter of offer dated 24 April 2015);

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(b) section 16.16 of the facility agreement dated 9 June 2015;

(c) section 16.16 of the facility agreement dated 30 May 2017;

(d) section 12.14 of the charge over project account dated 9 June 2015; and

(e) section 12.14 of the charge over project account dated 30 May 2017.

F

[36] By the specific deed of assignment of contract proceeds dated 9 June 2015 and general deed of assignment of contract proceeds dated 30 May 2017, the first defendant agreed that any proceeds in the first defendant's project account shall be prioritised towards payment of all moneys which are due and owing to the plaintiff and all other indebtedness of the first defendant owing and payable to the plaintiff before payment of surplus (if any) to the first defendant or any other person. This was provided in:

G

(a) section 16(1) of the Specific Deed of Assignment of Contract Proceeds dated 9 June 2015; and

H

(b) section 16(1) General Deed of Assignment of Contract Proceeds dated 30 May 2017.

I

[37] The first defendant's default under the facility agreements came about because there were insufficient funds to meet payment on the financings under the facilities even after the alleged wrongful payments by Petronas SKO into the designated account. The defendants have not shown to the court how the liability of the first defendant under the facilities would be affected should the matter go to trial and the circumstances of the alleged overpayment by Petronas SKO be confirmed.

A *Vague cause of action*

[38] The defendants submitted that the contents of the plaintiff's affidavit in support do not clearly set out the cause of action against the first defendant or against all the defendants as a whole. The defendants contended that the plaintiff merely bundled up the documents which were executed by the first defendant as exhibits and then proceeded to make various allegations without specifying precisely the nature of the breach alleged against the first defendant and other defendants.

C [39] In furtherance to this submission the defendants made other contentions:

- D (a) the plaintiff had knowledge that there are at present payments which are due from first defendant's projects which are still unpaid by the first defendant's clients into the first defendant's designate account with the plaintiff;
- E (b) payments made wrongly by Petronas SKO;
- (c) there was inaccurate calculation of the outstanding debt in the first defendant's account due to 'Variation Orders' together with 'Purchase Orders' not taken into account by the plaintiff;
- F (d) the plaintiff was satisfied with how the first defendant's projects were managed leading to yearly 'Letters of Annual Review' which increased the financing; and
- (e) monies received by the plaintiff directly from the first defendant's clients were not utilised by the plaintiff to settle the financing in an orderly fashion.

G [40] I do not accept that the defendants have raised any triable issue on this point.

H [41] The pleaded cause of action against the defendants which is based on the breach of the terms of the facilities and the guarantee is clearly set out in the cause papers filed by the plaintiff. The cause of action is founded on the failure of the first defendant and its guarantors (including the fourth defendant) in meeting the repayment for total outstanding due and owing under the facilities of RM15m, RM10m and RM3m availed to the first defendant.

I [42] When the defendants were alerted of the insufficient payments received into the project account, the defendants did not at any time contemporaneous to the facilities and failure to pay arrears installments suggest irregular administration of the project account. I agree with the plaintiff that in any

event, discrepancies of the purchase orders, debit notes and variation orders are matters as between the first defendant and its client and also with regards the alleged mistaken payment by Petronas SKO (which I had addressed above) is immaterial to the instant proceeding between the plaintiff and the defendants.

A

[43] The plaintiff further submitted, and I agree, that the earlier favourable review of the financings at the first defendant's request, subject to the terms and conditions of the facilities, does not operate to prohibit the plaintiff from recovering the outstanding sum from the defendants, nor do previous payments made by the first defendant and/or its client into the Project Account allow continuous default and breach by the defendants.

B

C

No trading of commodities

[44] The defendants submitted that the plaintiff has no basis to make the present claim in this suit based on the documents exhibited at exh 'SME1' (letters of offer, letters of changes and facility agreements) in the plaintiff's affidavit in support as the terms contained in the documents were not followed by the plaintiff. In relation to this, defendants submitted and contended as follows:

D

E

- (a) the first defendant never traded at the Bursa Sua Al Sila (BSAS) although the plaintiff contended that the documents are intended for financing of revolving trading of commodities which are bought and sold at the BSAS; and
- (b) further documents in the plaintiff's affidavit in reply (encl 69) do not show the trading of commodities but show or raised different causes of action which supports the defendants' assertion that the plaintiff's cause of action is vague.

F

G

[45] From an examination of the affidavits filed by the defendants, the following were also averred in relation to the defendants' submissions:

- (a) the first defendant was never involved in any trading transaction at BSAS and the plaintiff has no basis to make a claim now in relation to the documents exhibited in exh 'SME1' (para 7 and para 9(b) of encl 47; para 9.3 of encl 75);
- (b) the plaintiff is not entitled to enforce the terms of the facilities as this was not managed for the purpose of financing the sale and purchase of commodities at BSAS (para 8 of encl 47); and
- (c) the defendants have no knowledge of the purchase of the underlying Commodity at BSAS and dispute the validity of the *Wakalah* agreement dated 30 May 2017 and *Murabah* sale contracts which were not

H

I

A executed by the first defendant or its officers exhibited in exh 'SME8' of encl 69 (para 10 of encl 75).

[46] I find no merit in these submissions.

B [47] There is no requirement in law for the first defendant, the recipient of the financings under the facilities, to have been made a party to the purchase of the underlying Commodity under the three facilities, all Commodity *Murabahah*-i Financing. This mode of financing, based on an underlying asset, C 'Crude Palm Oil' traded at the BSAS is recognised in law as is provided for in the facility agreements dated 9 June 2015 and 30 May 2017.

[48] The documents relating to the facilities expressly authorise the plaintiff to purchase the Commodity with the first defendant's undertaking to purchase D the specified Commodity at the plaintiff's sale price.

[49] In respect of the third facility (CMRF-i Financing of RM15m):

(a) under 'Method of Financing', at p 2 of the letter of offer dated 24 April E 2015 it is prescribed that the first defendant is to request for the plaintiff to purchase Commodity from Commodity Trader and sell to first defendant;

(b) pursuant to sections 4, 6 and 7 of Appendix 12 of the facility agreement F dated 9 May 2015, the first defendant is to request for plaintiff to purchase Commodity from Commodity trader and sell to first defendant as per the asset sale agreement; and

(c) the recital of the asset sale agreement dated 2 June 2015 confirms the G first defendant's agreement to purchase crude palm oil traded at BSAS at the plaintiff's stipulated selling price of RM16,753,761.98 for the facility being the bank's purchase price and the plaintiff's profit upon deferred payment terms.

H [50] In respect of the the first facility (CMRF-i Financing of RM10m) and the second facility (CMRF-i Financing of RM3m):

(a) under 'Underlying Asset' and 'Method of Financing' in the letter of offer I dated 9 May 2017, it is provided that the underlying asset is Commodity traded at BSAS and the first defendant is to request for the plaintiff to purchase the Commodity from Commodity trader and sell to the first defendant as per the *Wakalah* agreement and *Murabahah* sale contract;

- (b) pursuant to cl. 3.2 (Nature and Method of the Facility) of the facility agreement dated 30 May 2017, the first defendant is to request for the plaintiff to purchase the commodity from the commodity trader and sell to the first defendant as per the *Wakalah* agreement and *Murabahah* sale contract; A
- (c) in Recital B of the *Wakalah* agreement dated 30 May 2017 it is stated that 'the Customer is desirous of appointing the Bank as the Customer's agent stated herein' with plaintiff's roles of agent that include execution of the *Murabahah* sale contract, purchase of the commodity and sale thereof provided in section 2. Section 2.5 and section 4 recognise that the first defendant shall hold the plaintiff harmless from any claim or loss by reason of acting as such agent; and B
- (d) in sections 1 and 3 of the *Murabahah* sale contract for CMRF-i of RM3m it is provided that the bank (the plaintiff) sells and the customer (the first defendant) purchases the Commodity at the plaintiff's sale price which includes the plaintiff's purchase price and the plaintiff's profit upon deferred payment terms. C D

[51] The mode of financing pursuant to the Commodity *Murabahah* concept was duly complied with all the necessary documents were duly executed and cannot be challenged by the defendants. The validity of financing under the Commodity *Murabahah* concept has consistently been recognised by the courts. See: *Kuwait Finance House (Malaysia) Berhad v Vesta Energy Sdn Bhd & Ors* [2012] MLJU 1762; [2012] 9 CLJ 516; and *RHB Islamic Bank Berhad v Veheng Global Trade Sdn Bhd & Ors* [2011] 1 LNS 684. E F

[52] The appointment of the plaintiff as the first defendant's agent to sell the Commodity in the market at the customer's sale price was to facilitate the transaction so as to be compliant with the Shariah requirements of the Commodity *Murabahah* transactions. It was observed by Rohana Yusuf J (as she then was) in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam Malaysia Bhd and another suit* [2011] 3 MLJ 766; [2010] 4 CLJ 388 (HC) that the demand on a person to fulfil contractual obligations in Shariah is an onerous one and challenges on the validity of an agreement of Islamic financing transactions after reaping the benefit is considered to be an attempt to renege contractual obligations which have been voluntarily agreed and acted upon. Also in *Dato' Haji Nik Mahmud bin Daud v Bank Islam Malaysia Bhd* [1998] 3 MLJ 393; [1998] 3 CLJ 605 (CA), the court did not concern itself with the intention of the parties to involve any transfer of proprietorship of the asset which was the basis of the Islamic financing transaction as what was important was the execution of the relevant property purchase agreement and the property sale agreement constituted part of the process required by the Islamic banking procedure before a party could avail itself of the financial facilities G H I

A provided by the customer. The contention by the defendants that the defendants have no knowledge of the purchase of the underlying Commodity at BSAS and the *Wakalah* agreement dated 30 May 2017 and *Murabah* sale contracts are not valid is farcical especially since the first defendant has benefited from the facilities granted by the plaintiff to the first defendant.

B
[53] The courts have consistently held that parties cannot dispute the validity of financing facilities when they have enjoyed the full benefits of the financings. See *Maybank Islamic Bhd v Kamarulzaman bin Mohamed Nordin* [2014] 7 MLJ 685; *United Trade Arena (M) Sdn Bhd & Ors v Bank Pertanian Malaysia Bhd* [2016] 2 MLJ 65; and *Bank Muamalat Malaysia Bhd & Ors v Redha Resources Sdn Bhd & Ors* [2017] 2 MLJ 686. Similarly, the
C fourth defendant together with his co-directors, had accepted the letters of offer and the contemporaneous documents for and on behalf of the first
D defendant who had enjoyed the full benefits of the facilities. The defendants cannot now fove years after execution of the 9 June 2015 facility agreement and all documents related thereto dispute the sale and purchase of the underlying commodity and the validity of the facilities.

E *Unenforceable guarantee*

[54] The defendants submitted that the guarantee executed by the fourth defendant is unenforceable as the plaintiff failed to conduct its part of the obligations in accordance the financing agreements executed by the first
F defendant.

[55] The defendants submitted further that the plaintiff has not proved its claim against the first defendant in this suit and it is therefore premature for the plaintiff to enforce the guarantee against the fourth defendant.

G
[56] I do not agree with these submissions. The plaintiff can pursue an action against the fourth defendant without the plaintiff having to first recover from the first defendant pursuant to the terms and conditions of the facility agreements and the guarantee and as recognised in law.

H
[57] Section 10.2 of the facility agreement dated 30 May 2017 provides as follows:

I Right to proceed concurrently: Notwithstanding any provision to the contrary herein, it is hereby expressly agreed that in the event of default or breach by the Customer of any term, covenant stipulation and/or undertaking herein provided on the part of the Customer to be observed and performed, the Bank shall, at its absolute discretion, have the exclusive right to exercise all or any of the remedies available to the Bank whether by this Agreement or Security Documents or by statute or otherwise and shall be entitled to exercise such or all the remedies

concurrently including pursuing all remedies of sale or possession or other remedies available and/or concurrently or otherwise institute civil proceedings against the Customer for the recovery of all monies due and payable owing to the Bank. A

[58] Clause 2 of the guarantee provides as follows: B

In the event of the Customer failing to observe and perform any of the covenants, undertakings, stipulations and terms contained in the Facility which have been executed by the Customer in your favour in respect of the payment of the monthly instalments and all sums payable thereunder and on the part of the Customer to be observed and performed you are at your absolute discretion notwithstanding anything to the contrary contained in the said Facility entitled to demand repayment in full from us of the whole of the instalments or such amount as may be outstanding including all moneys that are payable by the Customer pursuant to the said Facility. All payments by us under this guarantee shall be made in full without any deduction or withholding whether in respect of set off, counterclaim or otherwise whatsoever. C D

[59] The plaintiff is not precluded from pursuing its remedies against the fourth defendant as guarantor for the first defendant under the facilities as the guarantee does not contain such a condition before demand can be made on the guarantors. Further the fourth defendant and the other guarantors as principal debtors, irrevocably and unconditionally guaranteed jointly and severally to the plaintiff the payment of all sums of money owing to the plaintiff from the first defendant. See cl 15 of the guarantee. See also *EON Bank Bhd (previously known as Oriental Bank Bhd) v Mohd Yunus bin Alias & Ors* [2010] 9 MLJ 587; [2010] 1 LNS 419 where it was held that the effect of principal debtor clauses in a guarantee was that the bank was not obliged to realise other securities or proceed against the borrower before pursuing the guarantor. E F

[60] In any event, the defendants have failed to show that the plaintiff failed to conduct its part of the obligations in accordance the financing agreements executed by the first defendant as I have found above. G

CONCLUSION H

[61] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, It was quite clear to me that the plaintiff had clearly met the preliminary requirements in an O 14 application in accordance with the principles established by *National Company for Foreign Trade v Kayu Raya Sdn Bhd* and further, applying the leading Supreme Court case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627. Accordingly I held that the contentions of the defendants do not amount to triable issues or constitute any reasonable defence. I

A *Application allowed.*

Reported by Muhamad Azham Marwan

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